Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.*,*

Petitioners,

v.

LEGISLATURE OF THE STATE OF NEVADA, *et al.*,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In July 2003, the Nevada State Assembly voted on two tax bills that were deemed "passed" without the two-thirds vote required by the Nevada Constitution. The unconstitutional action was challenged in federal court by more than one third of the legislators in each house of the Nevada Legislature, individual citizens and taxpayers, and taxpayer and business associations. The following questions are presented by this petition:

1. Whether federal claims against a state legislature for unlawful vote dilution and nullification, arising under the Republican Guaranty, Due Process and Equal Protection Clauses of the United States Constitution, are insulated from federal court review merely because the state legislature's actions had been "authorized" by the state supreme court?
2. Whether the Ninth Circuit, in conflict with analogous decisions from the First and Seventh Circuits, erred in holding that a state legislature's adoption of a tax increase in conformity with the state constitution's two-thirds vote requirement rendered moot equitable claims arising under the federal Constitution challenging the legislature's actions deeming a prior tax bill as "passed" without the required two-thirds vote and seeking to prevent likely future action by the legislature in violation of the state constitution?
3. Whether the Ninth Circuit, in conflict with analogous decisions from several other circuits and contrary to this Court's precedents, erred in holding that there is a cognizable injury from unlawful vote dilution or nullification *only* when the vote dilution alters the outcome?
4. Whether the Ninth Circuit, in conflict with decisions of the D.C. Circuit, erroneously held that an altered legislative dynamic is not a cognizable injury?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioners: Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber, Members of the Nevada State Assembly; Hon. Mark E. Amodei, Hon. Barbara K. Cegavske, Hon. Warren B. Hardy II, Hon. Mike McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell, Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, and Hon. Maurice E. Washington, Members of the Nevada State Senate; Ira Victor Spinack, Eddie Floyd, Dolores Holets, Janine Hansen, Lynn Chapman, O.Q. Chris Johnson, Thomas Jefferson, David Schuman, Joel Hansen, Jonathan Hansen, Christopher Hansen, John Lusk, Ray Bacon, Greg White, Mary Lau, Larry Martin, Nanette Moffitt, Richard Ziser, Robert Larkin, Jill Dickman, Thomas Cox, Stan Paher and Judith Moss, taxpayers and citizens of, and voters in, the State of Nevada; Nevada Manufacturers Association, Inc.; Retail Association of Nevada; Nevadans for Tax Restraint; Nevada Concerned Citizens.

Nevada Manufacturers Association, Inc. and Retail Association of Nevada are non-profit trade associations incorporated in the State of Nevada, whose members are manufacturing and retail companies, respectively, doing business in the State of Nevada. Neither has a parent corporation. Neither has ever issued shares to the public. Nevadans for Tax Restraint and Nevada Concerned Citizens are unincorporated associations of Nevada taxpayers, citizens, and/or voters. The remaining Petitioners are all individuals.

Respondents: The Legislature of the State Of Nevada; The Senate of the State of Nevada; Hon. Lorraine T. Hunt, President of the Nevada Senate; The Assembly of the State of Nevada; Hon. Richard D. Perkins, Speaker of the Nevada Assembly; Jacqueline Sneddon, Chief Clerk of the Nevada Assembly; Diane Keetch, Assistant Chief Clerk of the Nevada Assembly; Brenda Erdoes, Legislative Counsel of the Nevada Legislature; Claire J. Clift, Secretary of the Nevada Senate; Hon. Kenny Guinn, Governor of the State of Nevada; Hon. Dean Heller, Secretary of State of the State of Nevada; Hon. Charles E. Chinnock, Executive Director, Nevada Department of Taxation.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Less then nine years ago, the voters of Nevada overwhelming amended their state constitution to prevent their Legislature from adopting bills increasing taxes without a two-thirds vote in each house. On July 13, 2003, the Nevada State Assembly violated that constitutional requirement, deeming a tax bill as "passed" without the requisite two-thirds vote. More than one-third of the legislators in each house of the Nevada Legislature, joined by individual citizens and taxpayers, taxpayer groups, and business groups, brought suit, claiming that the Assembly's action violated their constitutional rights by diluting their vote in violation

of the Equal Protection and Due Process clauses of the United States Constitution and by altering the structural mandates of the Nevada Constitution in violation of the federal constitutional guarantee of a republican form of government.

The Ninth Circuit Court of Appeals ultimately dismissed Petitioners' claims for declaratory and injunctive relief as moot, and dismissed their claim for nominal damages on the merits, holding that Petitioners failed to state a cognizable injury because the asserted vote dilution occurred over a bill—SB-6—that never became law. The Ninth Circuit's holding leaves in place an unconstitutional action by the Nevada Assembly that already altered and will continue to alter the legislative dynamic, and that called into question the ability of the people of Nevada to amend their own constitution. Important federal principals arising under the Republican Guaranty, Due Process, and Equal Protection clauses are at stake, warranting this Court's review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dismissing Petitioners' equitable claims as moot and Petitioners' legal claims for failure to state a claim, dated May 12, 2004, is available at 99 Fed. Appx. 90 and 188 Ed. Law Rep. 688, and is reproduced at pages 1a-5a of the appendix to this petition ("Pet. App."). The opinion of the Ninth Circuit denying Petitioners' emergency request for a preliminary injunction pending appeal, dated July 18, 2003, is reproduced at Pet. App. 6a. The opinion of the *en banc* United States District Court for the District of Nevada, dated July 18, 2003, dismissing Petitioners' complaint on *Rooker-Feldman* and other grounds is published at 274 F.Supp.2d 1152 and reproduced at Pet. App. 7a-14a. The minute order of the *en banc* District Court granting Petitioners' oral motion to enlarge the Temporary Restraining Order, dated July 16, 2003, is reproduced at Pet. App. 15a-17a. The order of

the *en banc* District Court granting Petitioners' request for a Temporary Restraining Order, dated July 14, 2003, is reproduced at Pet. App. 18a-19a. The opinion of the Ninth Circuit denying the petition for rehearing, dated June 22, 2004, is reproduced at Pet. App. 20a. There are no findings of fact, as no evidentiary hearing was held in this litigation or in the related state court mandamus proceeding in *Guinn v. Legislature of State of Nevada*, 71 P.3d 1269 (Nev. 2003) ("*Guinn I*"), *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003) ("*Guinn II*"), *cert. denied sub nom., Angle v. Guinn*, 124 S.Ct. 1662 (March 22, 2004).

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals holding that Petitioners' equitable claims were moot and that Petitioners' legal claims failed to state a cognizable injury was entered on May 12, 2004. The court denied a petition for rehearing on June 22, 2004. A timely request for extension, filed on September 9, 2004, was granted by Justice O'Connor on September 13, 2004, extending the time in which to file this petition until October 20, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the district court was proper under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

PERTINENT CONSTITUTIONAL PROVISIONS

The Republican Guaranty Clause of Article IV, Section 4 of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 4, Section 18 of the Nevada Constitution, adopted by voter initiative in 1996, provides, in relevant part:

> 2. Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.
>
> 3. A majority of all of the members elected to each house may refer any measure which creates, generates, or increases any revenue in any form to the people of the State at the next general election, and shall become effective and enforced only if it has been approved by a majority of the votes cast on the measure at such election.

Article 9, Section 2(1) of the Nevada Constitution provides:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Article 11, Section 2 of the Nevada Constitution, adopted in 1864, provides:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year . . . .

Article 11, Section 6 of the Nevada Constitution provides:

> In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

STATEMENT OF THE CASE

In 1994 and again in 1996,[1] Nevada voters overwhelmingly approved an amendment to their state constitution, which prohibited the Legislature from imposing new or increased taxes without the concurrence of two thirds of the members of each house of the Legislature. Nev. Const. art. 4 § 18(2). Tax measures that do not receive the necessary two-thirds vote may still be adopted, but must be submitted to the voters for approval before they can take effect. *Id.* § 18(3).

At the outset of the 2003 legislative session, Nevada Governor Kenny Guinn, one of the Respondents here, proposed to the Legislature a budget which included a $980 million tax increase, *Guinn II*, 76 P.3d, at 27, by far the most massive tax increase in the State's history. Unable to garner

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[1] Nev. Const. Art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The 2/3 vote tax initiative at issue here, also known as the "Gibbons Tax Restraint Initiative" after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada's 2nd District), was supported by more than 70% of the voters in each of the two elections.

the two-thirds vote required to approve the Governor's requested tax hike, the Legislature adjourned its session on June 3, 2003, having approved appropriations totaling more than $3.2 billion—without a dime for education, arguably the only spending item actually mandated by the Nevada Constitution. *Id.* Governor Guinn then immediately called the Legislature into special session to consider a tax increase and a couple of education funding bills.

Because the Nevada Constitution mandates a balanced budget, and because the previously-approved spending bills had left only $700 million to cover a proposed education budget of $1.6 billion, any appropriation for education approved during the special session by the Legislature that was anywhere near the amount proposed was going to require a tax increase of somewhere between $800 and $900 million. The Legislature could not consider reductions elsewhere in the budget because the Governor's special session proclamation did not give the Legislature such authority, and the Governor ignored requests to expand the special session to allow consideration of spending cuts or even reductions in the rate of spending increases already approved. *See* Nev. Const. art. 5, § 9 ("the Legislature shall transact no legislative business [in a special session convened by the Governor], except that for which they were specially convened"); *Guinn II*, 76 P.3d, at 27. The Nevada Assembly was unable to muster a two-thirds vote for any of the tax increases that reached the Assembly floor, either during the 19th Special Session or the 20th, convened by the Governor on June 25, 2003, although it was widely believed that a smaller tax increase would receive the necessary two-thirds vote. *See Guinn II*, 76 P.3d, at 28 ("The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase").

Minutes after midnight on July 1, 2003, the first day of the new fiscal year for the Nevada state government, Governor Guinn sued the Nevada Legislature and every one of its members. He petitioned the Supreme Court of Nevada for a writ of mandamus, seeking to compel the Legislature to take legislative action on his tax increase and thereby balance the budget and fund education by the means he had proposed but for which he had been unable to obtain the constitutionally-required level of support.

A group of legislators—some of the Petitioners here (the "Legislator Petitioners")—field a counter-petition, seeking an order directing the Governor to expand the special session so that the Legislature could also consider reductions in the spending increases already approved. *Id.* On July 10, 2003, the Nevada Supreme Court issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by "simple majority rule" rather than the two-thirds vote required by Article 4, Section 18(2) of the Nevada Constitution, unexpectedly granting a remedy that had not been requested by Governor Guinn or by any of the parties in the litigation. *Id.*, 76 P.3d, at 34-35 (Maupin, J., dissenting). Although the court acknowledged the constitutional validity of the two-thirds vote provision of Article 4, Section 18(2), it found, without evidentiary hearing, that the provision was preventing the Legislature from raising the taxes the court thought necessary to meet the education funding provisions of Article 11. And although the two-thirds vote provision was much more recent than the century-old education provisions, the court found the structural limitation imposed by Nevada voters on its Legislature to be a mere "procedural and general constitutional requirement" that had to "give way to the substantive and specific constitutional mandate to fund public education." *Guinn I*, 71 P.3d, at 1272.

Three days later, on Sunday, July 13, 2003, the Nevada State Assembly conducted a floor vote on SB-6, a bill designed to impose a gross receipts tax on certain businesses in the State of Nevada. Pet. App. 9a. Although the vote in favor of the bill did not meet the requirements of the Nevada Constitution, the Speaker of the Assembly, Respondent Richard D. Perkins, nevertheless ruled that the bill had "passed." *Id.* A point of order by Petitioner Lynn Hettrick, the Assembly Minority Leader, was rejected by the Speaker, based on the writ of mandamus that had been issued by the Supreme Court of Nevada three days earlier.

As a result of the Assembly's actions, Petitioners were harmed in the exercise of rights protected by the Federal Constitution. Specifically, some of the Legislator Petitioners (15 members of the States Assembly who were among those voting against SB-6—a sufficient number to defeat the tax increase bill) had their legislative votes diluted—indeed, nullified—in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment when the bill was deemed "passed". All of the Legislator Petitioners suffered a cognizable harm due to the altered legislative dynamic brought about by the unlawful vote dilution. Other Petitioners (individual voters of the State of Nevada, some residing in the districts of the Legislator Petitioners) had their right to undiluted representation infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment. Further, Petitioners had their right to a republican form of government infringed, in violation of the Republican Guaranty Clause of Article IV of the United States Constitution. This suit for nominal damages under 42 U.S.C. § 1983, costs and fees under 42 U.S.C. § 1988, and declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, followed.

On July 14, 2003, the United States District Court for the District of Nevada, sitting *en banc*, granted Petitioners'

Emergency Application for a Temporary Restraining Order ("TRO") so that the court could consider the constitutional issues raised by the Petitioners in a comprehensive manner. Pet. App. 10a, 18a. Hence, in order to maintain the status quo, "and good cause appearing," the District Court ordered that the Respondents be temporarily restrained from treating SB-6 as "passed" without the two-third vote required by Article 4, section18(2) of the Nevada Constitution. Pet. App. 18a-19a.[2] After additional briefing, a hearing on Petitioners' Motion for Preliminary Injunction and Respondents' Motion to Dismiss was held on July 16, 2003, and on July 18, 2003, the District Court entered its ruling granting Respondents' Motion to Dismiss and lifting the TRO. Pet. App. 14a. The claims by the Legislator Petitioners were dismissed as jurisdictionally barred under the *Rooker-Feldman* doctrine. Pet. App. 10a-12 (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-17 (1923); *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983)). The district court noted that the claims of the non-Legislator Petitioners were also likely barred by *Rooker-Feldman*, but dismissed those claims on the merits. Pet. App. 12a-14a. Within hours, the Legislator Petitioners[3] filed their Notice of Appeal and an emergency motion to the Ninth Circuit for a Preliminary Injunction Pending Appeal, which was denied later the same day by a motions panel consisting of Circuit Judges Graber and Wardlow, leaving the Nevada Legislature free to proceed with further consideration of SB-6 and other tax bills by simple majority vote rather than the two-thirds vote required by the Nevada Constitution. On July 19, 2003, Respondent

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[2] The Restraining Order was subsequently modified to restrain the Legislature from giving effect to *any* bill increasing taxes without the two-thirds vote required by the Nevada Constitution. Pet. App. 17a.

[3] The remaining Petitioners subsequently filed a notice of appeal of their own after their motion to intervene in the related state court action in *Guinn* was denied. The two appeals were then consolidated.

Nevada State Assembly "approved" another tax bill, SB-5, without the two-thirds vote required by the Nevada Constitution. Both SB-5 and the previously "passed" SB-6 were forwarded to the Nevada Senate for further consideration, but on Monday evening, July 21, 2003, the Senate and the Assembly were each able to garner the necessary two-thirds vote on an alternative tax bill, SB-8, which was then signed into law by the Governor and the special legislative session concluded without further action on either SB-5 or SB-6.

On May 12, 2004, the Ninth Circuit Court of Appeals, Circuit Judges T.G. Nelson, W. Fletcher, and Berzon, affirmed the District Court's *en banc* decision but on different grounds, holding that the Petitioners' claims for declaratory and injunctive relief were moot, and that their claim for nominal damages failed to state a cognizable injury.[4] Pet. App. 3a-5a.

On June 2, 2004, Petitioners filed with the Ninth Circuit a motion for panel rehearing, calling the court's attention to material points of fact and law that had been overlooked in the panel opinion. The panel relied on the fact that SB-6 had died with the legislative session to support its holding that Petitioners' equitable claims were moot, but overlooked the material fact that, during oral argument, the District Court had granted Petitioners' motion to enlarge the Temporary Restraining Order to bar Respondents from taking *any* action in violation of the two-thirds vote requirement of the Nevada

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[4] By reaching the merits of Petitioners' legal claims, the Ninth Circuit implicitly reversed the district court's holding that it was jurisdictionally barred by the *Rooker-Feldman* doctrine from considering Petitioners' claims. If the *Rooker-Feldman* jurisdictional bar remains viable, however, this Court should hold this petition pending resolution of *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102 (3d Cir. 2004), *cert. granted*, 2004 WL 2058940 (U.S. Oct. 12, 2004) (No. 03-1696), in which this Court will again consider the scope of the *Rooker-Feldman* doctrine.

Constitution, not just from giving effect to SB-6. And the panel's holding dismissing Petitioners' legal claims for failure to state a cognizable injury was made without benefit of an evidentiary hearing, and overlooked or misapplied applicable precedent of this Court and conflicting decisions from other circuit courts. The petition for rehearing was nevertheless summarily denied without comment on June 22, 2004.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for at least four reasons.

- This case presents important questions of federal constitutional law under the Republican Guaranty Clause of Article IV and the Due Process and Equal Protection Clauses of the Fourteenth Amendment that have not been, but should be, considered by this Court.
- The Ninth Circuit's holding that Petitioners' equitable claims were moot misapplies established precedent of this Court and is in conflict with decisions of the First and Seventh Circuit Courts of Appeals.
- The Ninth Circuit's holding that claims of vote dilution and nullification are only viable if the illegal vote dilution or nullification altered the legislative outcome cannot be reconciled either with this Court's decision in *Coleman v. Miller*, directly on point, or with countless analogous voting rights cases in which this Court and numerous lower courts have considered the merits of vote dilution or vote nullification claims without even mentioning, must less giving dispositive weight to, the ultimate electoral outcome.
- The Ninth Circuit's refusal to treat as an actionable harm undisputed allegations that the unlawful vote dilution had altered the legislative dynamic is in conflict with decisions of the D.C. Circuit.

I. This Case Involves Important Questions Under the Republican Guaranty Clause of Article IV and the Due Process and Equal Protection Clauses of the Fourteenth Amendment That Have Not Been, But Should Be, Addressed by this Court.

A. Whether the Failure of State Officials To Comply With Structural Commands of Their State Constitution Gives Rise to a Justiciable Republican Guaranty Clause Claim Should Be Addressed by this Court.

Article IV, section 4 of the U.S. Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government." Although claims premised on the Republican Guaranty Clause have long been viewed as nonjusticiable political questions in most circumstances, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O'Connor noted for the Court in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. 144, 183 (1992). "Contemporary commentators," she wrote, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *Id.* at 185 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 398 (2d. ed. 1988); J ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118, and n, 122-123 (1980); W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 287-289, 300 (1972); D. Merritt, *The Guarantee Clause and State Autonomy*, 88 COLUM. L. REV. 1, 70-78 (Jan, 1988); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-565 (1962)).

Several lower courts have acknowledged that the Republican Guaranty Clause might present justiciable questions in the wake of *New York v. United States*, but thus far all have found that the Clause had not been violated under the par-

ticular circumstances of those cases. *See Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Ind. Sch. Dist. v. Harris Cty, Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995); *but see*, *State ex. Rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Ore. 1997) (holding that Republican Guarantee claim is nonjusticiable).

This case presents one of the rare instances in which a Republican Guaranty Clause claim should be recognized as viable. The essence of the claim, drawn from this Court's opinion in *New York*, is whether a state's citizens may "structure their government as they see fit." *Kelley*, 69 F.3d at 1511. In *New York*, this Court dismissed the Guaranty Clause claim because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York 's government." 505 U.S. at 186. By imposing, through a constitutional amendment, a two-thirds vote requirement for tax increases, the citizens of Nevada adopted a new structure for their government with a new method of functioning when raising taxes. Actions that have a "realistic risk of altering the state's form of government" from what the citizens of the state have themselves adopted have been held to be amenable to Republican Guarantee Clause claims. *Texas*, 106 F.3d at 667; *New Jersey*, 91 F.3d at 468-69. Essentially, the federal courts are supposed to protect the structural preferences of a state's citizens, serving as a sort of "structural referee." *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

The decision by Respondent Nevada State Assembly to ignore the governing structure imposed upon it by the State's citizens via a constitutional amendment is just the kind of violation of the Article IV guaranty of a republican form of government that other federal courts have begun to entertain. Whether such claims are justiciable is an important question that has not been, but should be, considered by this Court; indeed, this Court invited just such a consideration in *New York* itself.

B. Whether Federal Constitutional Guarantees of Equal Protection and Due Process Check Unlawful Action by State Legislatures Purportedly Authorized by State Courts Is Also An Issue Worthy of this Court's Review.

Similarly, the extent to which the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment serve as a check on state legislative action purportedly authorized by arbitrary interpretations of a state constitution by the highest court of the State is an important question that has not been, but should be, addressed by this Court. State courts simply do not have a free hand to interpret state law beyond what a "fair reading" would permit, without violating due process. *Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000). Necessarily, then, actions by state officials in reliance on the unconstitutional interpretation by the state's Supreme Court are as susceptible to the review of the federal courts and ultimately of this Court as would be the state court decision itself. The several ways in which the Nevada Supreme Court violated Due Process in rendering the decision relied on by Respondents for the actions they took in violation of the Nevada Constitution is therefore an important backdrop to this Court's review of the federal court decision below.

1. The Remedy Afforded by the Nevada Supreme Court Had Not Been Requested, or Even Suggested, by Any Party.

One of the most curious aspects of the Nevada Supreme Court's decision in *Guinn* was that no party ever asked the court to invalidate Article 4, Section 18(2), or even to suspend its operation in this session. *See Guinn I*, 71 P.3d, at 1276 (Maupin, J., dissenting) (noting without contradiction that "none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today"). The Governor, too, admitted during the federal court proceedings below that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." Brief for Defendant Guinn in Opposition to Mot. for Prelim. Inj., at 6. The un-requested remedy was nevertheless imposed by the Nevada Supreme Court, without argument or hearing, contrary to the most basic precepts of due process. *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) (holding that parties need "to know the issues on which decision will turn and to be apprised of the factual material" so that they may rebut claims against them) (citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *United States v. Abilene*, 265 U.S. 274 (1924)).

2. The Nevada Court Failed to Enforce A Valid Constitutional Amendment.

The Nevada Court gave life to the old law-school hypothetical notion of "unconstitutional constitutional amendments." The notion posits that there are some provisions of a constitution so fundamental, so central to basic principles of political theory, that they simply cannot be amended. *See, e.g.*, WALTER F. MURPHY, THE NATURE OF THE AMERICAN CONSTITUTION (1989); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional*

Speech, 48 VAND. L. REV. 349, 380 (1995). Even if it would *ever* be appropriate for a court to invalidate a constitutional amendment on such grounds, the Nevada Supreme Court was not addressing such a case. Unlike the examples typically used in the hypothetical context—separation of powers restrictions, for example, or supermajority requirements for the adoption of amendments—the Nevada Supreme Court here *rejected*, rather than protected, a structural provision in favor of a non-structural one.

3. The Nevada Court Ignored Several Well-Established Canons of Construction.

The Nevada Supreme Court also ignored or misapplied a number of longstanding interpretative canons in the course of rendering its extraordinary and unexpected decision, including:

- More recently enacted constitutional provisions prevail over older provisions;
- Specific provisions will prevail over generalized provisions on the same subject matter;
- A court is, to the maximum extent possible, supposed to reconcile apparently conflicting provisions;
- A court must give effect to unambiguous provisions;
- A court sitting in equity will not render equity to a party coming with "unclean hands."

The Nevada Court's utter refusal to follow or consistently apply any one of those traditional canons of interpretation would raise serious due process concerns, but its failure faithfully to apply any of them amounted to a perfect storm of Due Process violations. As a result, the arbitrary decision of the Nevada Supreme Court cannot serve to shield the unconstitutional actions by the Nevada State Assembly from federal court review.

II. The Ninth Circuit's Holding that the Nevada Legislature's Compliance With the Two-Third Vote Requirement On *Another* Tax Bill Rendered Moot Petitioners' Equitable Claims Seeking To Prevent Future Likely Violations of the Nevada Constitution Is Contrary To This Court's Precedent and In Conflict With Decisions of the First and Seventh Circuits.

The Ninth Circuit dismissed Petitioners' equitable claims on mootness grounds, despite the fact that the decision of the Nevada Supreme Court "authorizing" the Legislature to ignore the two-thirds vote provision of the Nevada Constitution remains on the books, where it "lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). The Ninth Circuit's holding is contrary to long-established precedent of this Court and in conflict with recent decisions from the First and Seventh Circuits.

A. A Government's Voluntary Cessation of Illegal Conduct Does Not Render a Case Moot Where the Government Remain Free to Repeat the Illegal Conduct.

This Court has held that a case is not rendered moot by the voluntary cessation of the conduct challenged as unconstitutional unless "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 508 U.S. 656 (1993); *United States v. W.T. Grant Co*, 345 U.S. 629, 632 (1953); *Local 75, United Broth. Of Carpenters & Joiners of America, A.F. of L. v N.L.R.B.*, 341 U.S. 707, 715 (1951).

Here, although Respondents ultimately adopted *another* tax bill, SB-8, by the required two-thirds vote margin, Respondents remain free to pass—indeed, are likely to pass—a tax increase on a bare majority vote (rather than the constitutionally-required two-thirds vote) during the next legislative session, which convenes in February 2005. It is thus far from "absolutely clear" that the illegal conduct is not reasonably expected to recur.

Indeed, the Nevada Supreme Court in the related *Guinn* litigation itself acknowledged not just the possibility, but the likelihood, that the Legislature again will again ignore the two-thirds vote provision of the Nevada Constitution: "Because the State Distributive School Account is such a large component of the general fund, difficulties concerning the supermajority provision's application were certain to arise with respect to public school funding, no matter when addressed." *Guinn II*, 76 P.3d, at 27 n.15. So did Senator Dina Titus, a member of Respondent Nevada State Senate here: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA [education funding bill] because of this ruling" in *Guinn*. Steve Kanighe, *Landmark Ruling Likely to Affect Future Sessions*, Las Vegas Sun, July 12, 2003 at 1. *Available at* http://www.lasvegassun.com/sunbin/stories/sun/2003/jul/12/515333226.html. And the Nevada State Education Association ("NSEA"), one of the Governor's *amici*, made the same point in the *Guinn* litigation. In its brief opposing a motion to vacate, the NSEA contended—repeatedly—that the Nevada Supreme Court should *not* vacate its decision precisely because the legislative stand-off that resulted from the two-thirds vote requirement of the Nevada Constitution was so capable of repetition every budget cycle. Brief of Amici Curiae NSEA, *et al.*, at 5, *Guinn II* (noting that the damage allegedly inflicted upon school districts by the 2/3 vote provision "has not somehow been undone by the recent passage of the school funding bill"); *id.* at 6 ("The [July 10] opinion should

should not be withdrawn, because the crisis that precipitated it is otherwise likely to recur"); *see also* Brief of Amici Curiae NSEA, *et al.*, at 6 n.7 ("it is *highly probably* that this [legislative] session will not be the last in which the Gibbons initiative will result in a budget crisis") (emphasis added).

Thus, the standard set by this Court that a case becomes moot as the result of voluntary cessation only when "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," has not remotely been met, and the Ninth Circuit's erroneous ruling to the contrary warrants this Court's review, given the important constitutional issues that were thereby avoided by the Ninth Circuit.

Further, the Ninth Circuit's holding that Petitioners' claim for declaratory relief was rendered moot by the passage of SB-8—the intervening tax increase that made further consideration of SB-6 and SB-5 unnecessary—is in conflict with the Seventh Circuit's recent decision in *Crue v. Aiken*, 370 F.3d 668, (7th Cir. 2004). *Crue* dealt with a First Amendment challenge to the refusal by the Chancellor of the University of Illinois to permit, without prior approval, contact of prospective student-athletes by a University group wishing to discourage matriculation at the University because of its use of an Indian mascot. After the district court entered a temporary restraining order enjoining enforcement of the Chancellor's pre-clearance directive, the Chancellor retracted the directive. The Seventh Circuit held that the retraction rendered only the claim for injunctive relief moot; the claims for declaratory relief and for damages remained "live." *Id.*, at 677-678. The Court further stated: "When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive." *Id.* (*citing Wolff v. McDonnell*, 418 U.S. 539 (1974); *Powell v. McCormack*, 395 U.S. 486, 89 (1969);

Penny Saver Publ'ns, Inc. v. Village of Hazel Crest, 905 F.2d 150 (7th Cir.1990)).

Thus, even assuming that the Nevada Legislature's adoption of SB-8 by the constitutionally-required vote rendered Petitioners' claim for injunctive relief moot, the claim for declaratory relief survives as a predicate to the nominal damages claim. The Ninth Circuit's decision to the contrary is in conflict with the decision of the Seventh Circuit in *Crue*.

B. Even if Respondents' Subsequent Approval of SB-8 Rendered Petitioners' Equitable Claims Moot, the Ninth Circuit Still Had Jurisdiction Because Respondents' Actions Are Capable of Repetition, Yet Evading Review.

Even if all of Petitioners' equitable claims actually were moot despite the Legislature's voluntary cessation, the same concessions described above demonstrate that the case is capable of repetition yet evading review, an exception to the mootness bar. *See Moore v. Ogilvie*, 394 U.S. 814, 815 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). This Court crafted the "capable of repetition" exception to mootness "partly because of the necessity or propriety of deciding some questions of law presented which might serve to guide municipal body when again called upon to act in this matter." *Southern Pacific*, 219 U.S., at 515-16 (quoting *Boise City Irrig. & Land Co. v. Clark*, 131 F. 415, 419 (9th Cir. 1904)).

The potential for injuries evading review is especially relevant here. Under the ostensible authority of the Nevada Supreme Court's July 10, 2003 writ of mandamus—entered in a case that had been filed only ten days earlier—the Legislature "passed" SB-6 within three days of the Nevada Supreme Court's ruling. The extremely fast pace of the events leading to this litigation suggests that, in the future, the deprivation of Petitioners' federal rights is again likely to recur without the opportunity to be heard. As Assemblyman Morse

Arberry, Chairman of the Assembly Ways and Means Committee, noted in the related *Guinn* state court action, "budgetary bills are typically among the last bills to be enacted in most legislative sessions." Brief of Respondent Assemblyman Morse Arberry in Opp. To Pet'n for Reh'g, at 3, *Guinn II*. They are "considered in the last week of the legislative session." *Id.*

Review is also warranted to resolve a recent circuit split concerning the proper scope of the "capable of repetition, yet evading review" exception. The Ninth Circuit's holding—that Petitioners' case is moot because "[n]either of the two allegedly harmful actions in this case (i.e., the Nevada Supreme Court writ of mandamus ordering the Legislature to conduct the 20th Special Session under "simple majority rule," and the "passage" of SB-6 itself) may ever be repeated"—is in conflict with the First Circuit Court of Appeals' recent decision in *Becker v. Federal Election Comm'n*, 230 F.3d 381 (1st Cir. 2000). In *Becker*, the First Circuit held that presidential candidate Ralph Nader's challenge of corporate sponsorship of a presidential debate from which he was excluded did not become moot once the debates had been held because "corporate sponsorship of the debates is sure to be challenged again in future elections, yet, as here, the short length of the campaign season will make a timely resolution difficult." *Id.* at 389 (citing *Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2nd Cir. 1989); *Johnson v. F.C.C.*, 829 F.2d 157, 159 n. 7 (D.C. Cir. 1987)). The Ninth Circuit's focus on the concluded legislative session to support its mootness holding thus stands in stark contrast to the First Circuit's refusal to render a mootness determination by focusing only on the concluded presidential debate. Adoption by the Nevada Legislature of tax bills by simple majority vote is just as surely to be challenged in future legislative sessions as was the corporate sponsorship at issue in *Becker*, and the 120-day limit on Ne-

vada legislative sessions is, if anything, less than length of a presidential campaign season, yet the Ninth Circuit nevertheless rejected Petitioners' contention that the case was capable of repetition yet evading review.

III. The Ninth Circuit's Holding that Petitioners' Did Not Have a Cognizable Injury from Vote Dilution Is Inconsistent with this Court's Precedent and in Conflict with Decisions of Several Circuit Courts.

A. The fact that an unlawfully "passed" bill does not ultimately take effect does not negate vote dilution injury.

The issue raised by the Ninth Circuit's decision with respect to Petitioners' claim for nominal damages is whether an individual legislator whose vote has been unlawfully diluted (or whether a legislator's constituent whose representation has been unlawfully diluted) ever has a cognizable harm if, for other reasons, the bill on which the unlawful vote dilution occurred never takes effect. The Ninth Circuit misapplied *Raines v. Byrd*, 521 U.S. 811 (1997), *Coleman v. Miller*, 307 U.S. 433 (1939), and *Gutierrez v. Pangelinan*, 276 F.3d 539 (9th Cir. 2002), to hold that there is not a cognizable harm in such circumstances. The mistaken reading of *Coleman* and *Raines* accepted by the Ninth Circuit is so profound and far-reaching in its implication as to warrant this Court's attention.

In *Coleman*, this Court expressly recognized that a state legislator has a federal cause of action to challenge actions by the state legislature that dilute or render nugatory the legislator's vote. 307 U.S., at 438 (holding that state legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes"). At issue in *Coleman* was whether, in voting to ratify a federal constitutional amendment, the lieutenant governor of the State was permitted to cast a vote in the event of a tie. As this Court noted, "the

twenty senators [who were petitioners in the case] were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." *Id.*, at 441; *cf. Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997) (noting that "the harm worked by [a rule changing the amount of votes necessary to pass legislation]—diluting the Representatives' votes and diminishing their ability to advocate a position—is apparent, as is the command of the Constitution that we remedy that harm").

Although *Coleman* involved a federal constitutional amendment, several courts have recognized that a state legislature's failure to comply with its own procedures may violate federal Due Process. *See, e.g., Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985)); *Conway* v. *Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997). "Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes for the enactment of legislation," *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), not by legislation enacted in violation of the procedures mandated by the state constitution, as here. "Legislative rules are judicially cognizable, and may therefore be enforced by the Courts." *Conway*, 954 F. Supp. at 769 (citing *Yellin v. United States*, 374 U.S. 109, 114 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949)).

Moreover, this Court has expressly suggested, albeit in *dicta*, that members of state legislative bodies have standing to bring a vote dilution claim that arises from violations of *state law*. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) ("if . . . state law authorized School Board action solely by unanimous consent," a disenfranchised school board member "might claim that he was le-

gally entitled to protect 'the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S., at 438) (brackets in original). A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board." *Id.*

The hypothetical case described in *Bender* is nearly identical to the case here. State law—Article 4, Section 18(2) of the Nevada Constitution—authorizes legislative action on tax increases "solely" by two-thirds vote. The disenfranchised legislators—the Legislator Petitioners here, who together provided enough votes to defeat the tax increase pursuant to the two-thirds vote requirement of Article 4—claimed that their vote was diluted below the weight required by state law. This is thus a classic case of vote dilution, in violation of the Due Process Clause.

This Court's recent decision in *Raines* is not to the contrary. *Raines* involved a challenge by six members of Congress—4 of 100 Senators and 2 of 435 Representatives—who alleged that the federal line item veto diluted their legislative power. This Court expressly distinguished *Coleman*, not because the legislative action at issue in *Coleman* had taken effect, as the Ninth Circuit contended, but because the number of legislators challenging the allegedly unlawful action in *Coleman*, unlike the number challenging the line-item veto in *Raines*, was sufficient to have affected the outcome. *Raines*, 521 U.S., at 812. It was for this reason that the *Raines* Court ruled that "the institutional injury [plaintiffs] allege is wholly abstract and widely dispersed (contra, *Coleman*)." *Id.*, at 829; *see also Silver v. Pataki*, 755 N.E.2d 842, 849 (N.Y. 2001) (allowing, under *Coleman*, vote nullification suit by a single legislator but disallowing, under *Raines*, as a mere abstract political harm, a claim by the same legislator that his ability to negotiate the Assembly's budgetary priorities had been affected).

Indeed, if the Ninth Circuit's interpretation of *Coleman* were correct, *Coleman* itself would have been decided differently. The federal constitutional amendment at issue in *Coleman*—the Child Labor Amendment, 43 Stat. 670—never did take effect. The Kansas legislature was just one part in the amendment process, just as the Nevada Assembly in this case is just one part of the legislative process. The decision by the Kansas Lieutenant Governor to cast a tie-breaking vote in favor of ratification and then to deem Kansas' ratification as "passed" no more gave ultimate "effect" to the amendment than did the decision by the Speaker of the Nevada Assembly deeming SB-6 as "passed" give effect to that tax increase. In both cases further action by other bodies was required before the Act would become effective. Yet in *Coleman* the Supreme Court considered the merits of the legislators' claims despite the fact that the allegedly unlawful vote dilution had not resulted in the proposed amendment actually taking effect. The claim of vote dilution, by a group of legislators sufficient in number to have affected the outcome, was alone sufficient to qualify as a cognizable injury.

This Court should grant certiorari in this case to consider what was only *dicta* in *Bender*, and to address the implicit split on this issue between the decisions of the Ninth Circuit below and the related decision of the Nevada Supreme Court in *Guinn*, on the one hand, and the Fourth and Ninth Circuits and the District of Vermont, in *Richardson, Rea*, and *Conway*, respectively, on the other.

B. The Ninth Circuit's holding has far-reaching consequences.

The implication of the Ninth Circuit's "no harm, no foul" holding is far-reaching. Vote dilution or outright vote nullification claims by individual voters could only be sustained if the candidate opposed (or supported) by the disenfranchised voters was actually elected (or defeated). That has never been a consideration in this Court's vote dilution jurispru-

dence, *see, e.g., Miller v. Johnson*, 515 U.S. 900 (1995), yet the Ninth Circuit's holding compels such a result.

The Ninth Circuit's outcome-determinative test is in conflict with decisions from other circuit courts as well. The First, Fifth, Eighth and D.C. Circuit Courts of Appeal, for example, have all considered vote dilution claims, and none have applied the outcome determinative test adopted by the Ninth Circuit. *See, e.g., Coalition for Sensible and Humane Solutions v. Wamser*, 771 F.2d 395 (8th Cir. 1985); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36-37 (1st Cir. 1993) (citing *AVX Corp. v. United States*, 962 F.2d 108, 113-14 (1st Cir. 1992)); *Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978); *Creel v. Freeman*, 531 F.2d 286, 286-89 (5th Cir. 1976); *Locklear v. North Carolina State Board of Elections*, 514 F.2d 1152, 1152-56 (4th Cir. 1975); *Skaggs*, 110 F.3d, at 833.

C. The Ninth Circuit's holding also failed to recognize cognizable injuries of the non-Legislator Petitioners that have been recognized by this Court and other circuit courts.

This Court has repeatedly recognized vote dilution claims by voters. *See Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). "'[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

That the dilution occurs after the voters' representative is elected, and is therefore derivative of the legislator's own vote dilution claim, is immaterial. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *see also Skaggs*, 110 F.3d, at 834. As the D.C. Circuit noted in *Michel*: "It could not be argued seriously that voters would not have an injury if their

congressman was not permitted to vote at all on the House floor." 14 F.3d, at 626. Depriving voters of the full weight of the representation guaranteed by the Nevada Constitution's two-thirds vote requirement is only a difference in degree from the hypothetical embraced in *Michel* as a self-evident constitutional violation.

The Ninth Circuit's decision below dismissing the vote dilution claims of the non-Legislator Petitioners is thus contrary to well-established precedent of this Court and in conflict with holdings of the D.C. Circuit in *Michel* and *Skaggs*. Certiorari is warranted.

The Nevada Supreme Court's decision has also effectively nullified the votes several of the Petitioners successfully cast in support of the Gibbons Constitutional Tax Initiative in 1994 and 1996, by which an overwhelming percentage of Nevadans approved the two-thirds vote amendment to the state Constitution. The right to vote constitutes more than just the right to show up at a voting booth. It encompasses the right to have that vote counted and, if successful, to have the results of the vote given effect. *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Mosley*, 238 U.S. 383, 386 (1915).

By deeming tax increases as "passed" by simple majority rule, Respondent Nevada State Assembly essentially treated the successful vote of some Petitioners for the Gibbons Constitutional Tax Initiative as without any effect, at least whenever there is a budget stand-off involving spending for education. By so doing, the Nevada State Assembly deprived Petitioners of their right to an effective vote, a right protected by the Fourteenth Amendment of the U.S. Constitution.

In addition, Respondent Nevada State Assembly essentially gave greater—indeed dispositive—weight to the votes of those who opposed the Gibbons Constitutional Tax Initiative, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104-05

(2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another") (citing *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 665 (1966)).[5]

Because these fundamental federal voting rights are so clearly established, and so clearly violated here, the decision of the Ninth Circuit dismissing Petitioners' federal constitutional claims is clearly contrary to the decisions of this Court and certiorari is warranted.

D. The Ninth Circuit's Refusal To Treat As an Actionable Harm Undisputed Evidence that the Unlawful Vote Dilution Altered the Legislative Dynamic Is in Conflict with Decisions of the D.C. Circuit.

Finally, the Ninth Circuit's decision treated as irrelevant undisputed allegations[6] that the Nevada Assembly's unconstitutional vote dilution had altered the legislative dynamic,

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[5] The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. *See Bush*, 531 U.S., at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).

[6] Because the action by the Nevada Legislature approving *another* tax bill by the required two-thirds vote occurred *after* the district court dismissed the case, there was never an evidentiary hearing to determine whether Petitioners could demonstrate other sufficiently concrete injuries to support federal jurisdiction over the suit, or even an opportunity for Petitioners to amend their complaint to allege such injuries. Nevertheless, Respondents acknowledged—indeed, touted—the changed legislative dynamic in briefing before the Nevada Supreme Court in the related *Guinn* litigation, so Petitioners' assertion of a changed legislative dynamic is "undisputed." *Guinn II*, 76 P.3d at 25 (quoting Brief of Legislature in Opp. to Pet'n for Reh'g at 5).

holding instead that Petitioners had failed to establish any cognizable harm.

The Ninth Circuit's decision stands in stark contrast with that of the D.C. Circuit in *Skaggs*. In *Skaggs*, the D.C. Circuit recognized that "the harm worked by [a rule changing the amount of votes necessary to pass a bill]—diluting the Representatives' votes and diminishing their ability to advocate a position—is apparent." *Id.*, at 833; *see also Michel,* 14 F.3d, at 632 (rejecting claim that allowing non-member Congressional delegates to vote in committee of the whole "causes a change in the dynamics of the behavior of the House" not because changed dynamics were not sufficient for a vote dilution claim, but because the particular change at issue in that case was "largely symbolic").

This conflict, too, warrants this Court's attention.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners

Dated: October 20, 2004.

APPENDICES

APPENDIX A
NINTH CIRCUIT OPINION

United States Court of Appeals
For the Ninth Circuit

Mark E. AMODEI; Walter Andonov; Sharron E. Angle; Ray Bacon; Bob Beers; David F. Brown; John C. Carpenter; Barbara K. Cegavske; Lynn Chapman; Chad Christensen; Thomas Cox; Jill Dickman; Eddie Floyd; Peter J. Gocoechea; Thomas J. Grady; Donald G. Gustavson; Christopher Hansen, Janine Hansen; Joel Hansen; Jonathan Hansen; Warren B. Hardy, II; Lynn C. Hettrick; Dolores Holets; Thomas Jefferson; O.Q. Chris Johnson; Ronald L. Knecht; Robert Larkin; Mary Lau; John Lusk; R. Garn Mabey, Jr.; Larry Martin; John W. Marvel; Mike McGinness; Nanette Moffitt; Judith Moss; Nevada Concerned Citizens; Nevada Manufacturers Association; Nevadans for Tax Restraint; Dennis Nolan; Ann O'Connell; Stan Paher; Retail Association of Nevada; Dean A. Rhoads; Roderick R. Sherer; David Shuman; Ira Victor Spinack; Sandra J. Tiffany; Maurice E. Washington; Valerie E. Weber; Greg White; Richard Ziser,

Plaintiffs--Appellants,

v.

NEVADA STATE SENATE; Nevada State Assembly; Nevada State Legislature; Diane Keetch; Lorraine T. Hunt; Dean Heller; Kenny Guinn; Brenda Erdoes; Claire J. Clift; Charles E. Chinnock,

Defendants--Appellees.

No. 03-16326.

Argued and Submitted April 15, 2004.
Decided May 12, 2004.

Before: T.G. NELSON, W. FLETCHER, and BERZON, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellants, members of the Nevada Legislature ("Legislator Plaintiffs") and citizens and taxpayers of Nevada ("Non-Legislator Plaintiffs"), brought suit in federal district court under 42 U.S.C. § 1983 against other members of the Nevada Legislature, the Governor of Nevada, and other state officials. Appellants alleged violations of their federal due process and equal protection rights, and of the Republican Guaranty Clause, Article IV, Section 4, of the United States Constitution. The district court dismissed the suit in part as barred by the *Rooker-Feldman* doctrine, and in part for failure to state a claim. As the parties are familiar with the facts of this case, we do not repeat them here. We affirm.

ANALYSIS

The passage of SB 8, a bill increasing public revenues and appropriating funds for public education, by a two-third vote of both the State Senate and the State Assembly, and the enactment of that bill into law, rendered Appellants' claims for declaratory and injunctive relief moot. "A case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Porter v. Jones,* 319 F.3d 483, 489 (9th Cir.2003) (quotation marks omitted). Appellants' claims for declaratory and injunctive relief rely on the supposed intention of the defen-

dants to permit SB 6 to become law without the two-third vote required by the Nevada state constitution. The passage of SB 8 negated any such possibility. Therefore, appellants' claims for declaratory and injunctive relief are moot.

This case is not saved from mootness by either the "voluntary cessation" nor "capable-of-repetition-yet-evading-review" branches of the mootness doctrine. These branches require, respectively, a determination that "the allegedly wrongful behavior could . . . reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), and that "there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Porter*, 319 F.3d at 489-90. Neither of the two allegedly harmful actions in this case (i.e., the Nevada Supreme Court writ of mandamus ordering the Legislature to conduct the 20th Special Session under "simple majority rule," and the "passage" of SB 6 itself) may ever be repeated, as they were both directed to specific periods in time that have already passed (i.e., the 20th Special Session, and the period for planning the 2004 budget).

Appellants' remaining claim for nominal damages remains a live controversy, however. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) ("[W]e must conclude that Berhardt's claims for prospective relief are moot, although we hold that her possible entitlement to nominal damages creates a continuing live controversy."); *Porter*, 319 F.3d at 489 ("Plaintiffs retain a cognizable interest in their claims for damages, which clearly indicates that a live controversy remains between the parties."). The district court dismissed this claim on two grounds: lack of subject matter jurisdiction (with respect to the Legislator Plaintiffs) and failure to state a claim, under Rule 12(b)(6) (with respect to the Non-Legislator Plaintiffs). We review the district court's dismissal de novo. *Kougasian v. TMSL*, 359 F.3d

1136, 1139 (9th Cir. 2004) (reviewing a district court's dismissal for lack of subject matter jurisdiction de novo); *Vestar Development II, LLC v. General Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) ("This court reviews de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)."). We affirm the district court's dismissal of this claim on the ground that Appellants have failed to allege an injury.

Article III of the Constitution requires that a plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," for a federal court to assert jurisdiction over the suit. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted). "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright,* 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). "Abstract injury is not enough" to sustain federal jurisdiction. *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 219, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)) (internal quotation marks omitted). Here, Plaintiffs have alleged only an abstract injury. SB 6 did not pass the State Senate and was not enacted into law. No taxpayer paid a nickel into the coffers of Nevada under its rule. Although the members of the Assembly who voted against SB 6 claim a completed injury through vote dilution, there is no cognizable injury in fact, sufficient to establish an Article III controversy, where the vote in question never resulted in legislation. *See Raines v. Byrd,* 521 U.S. 811, 824, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (holding that the legislator plaintiffs did not allege a sufficient injury because they did not "allege[ ] that they voted for a specific bill, that there were sufficient votes to pass the

bill, and that the bill was nonetheless deemed defeated"). Thus, Appellants have failed to allege a sufficiently concrete injury to support federal jurisdiction over the suit. *Coleman v. Miller,* 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), does not require a contrary result. As the Supreme Court stated in *Raines, "Coleman* stands (at most ...) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue *if that legislative action goes into effect (or does not go into effect),* on the ground that their votes have been completely nullified." 521 U.S. at 823, 117 S.Ct. 2312 (emphasis added). This court has further explained that "the critical fact in *Coleman* was that if the plaintiff-senators were correct on the merits, their votes should have been sufficient to effect a particular result (defeat of the resolution); *but the allegedly illegal act instead effected the opposite result (certification of the resolution)." Gutierrez v. Pangelinan,* 276 F.3d 539, 545-46 (9th Cir. 2002) (emphasis added). In the case at hand, if the Plaintiffs were correct on the merits, their votes should have been sufficient to defeat SB 6. The allegedly illegal act did not, however, "effect[ ] the opposite result," namely, the enactment of SB 6 into law. Therefore, *Coleman* is of no avail to Plaintiffs in their pursuit of standing.

AFFIRMED.

APPENDIX B
DENIAL OF PRELIMINARY INJUNCTION PENDING APPEAL

United States Court of Appeals
For the Ninth Circuit

HON. SHARRON E. ANGLE, *et al.*,

Plaintiff-Appellants,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *et al.*,

Defendants-Appellees.

OPINION
CV-N-03-0371

JULY 18, 2003

Before: GRABER AND WARDLAW, Circuit Judges

Appellants' emergency motion for preliminary injunction pending appeal is denied.

This case is set for expedited briefing. The opening brief and excerpts of record are due August 29, 2003; the answering brief is due September 29, 2003; and the optional reply brief is due within 14 days after service of the answering brief. The Clerk shall calendar this case for submission as soon as possible following receipt of the answering brief.

APPENDIX C

DISTRICT COURT OPINION

United States District Court
District of Nevada

HON. SHARRON E. ANGLE, *et al.*,

Plaintiff,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *et al.*,

Defendants.

CV-N-03-0371

July 18, 2004

OPINION

Before PRO, Chief Judge, and McKIBBEN, HAGEN, HUNT, DAWSON, HICKS, and MAHAN, Judges.

PER CURIAM

Before the court is plaintiffs' motion for preliminary injunction. This action arises from the failure of the Nevada legislature, within the time limits set by the Governor, to approve and fund a balanced budget and to appropriate funds for public education for the 2003-2005 biennium. Upon petition of the Governor, the Nevada Supreme Court issued a Writ of Mandamus which interpreted the Nevada Constitu-

tion in a manner that allowed the Legislature to pass a tax increase without the constitutionally mandated two-thirds majority and then ordered lawmakers to proceed under that interpretation. When the Assembly thereafter passed the tax bill, SB 6, by a simple majority, plaintiffs filed for relief in this court.

I. Factual Background

After Nevada voters twice approved by initiative a requirement that any tax increase be passed by a two-thirds majority vote in the Legislature, the Nevada Constitution was amended in 1996 to so provide. Now, Article 4, §18(2) requires a two-thirds vote of each House "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes...." This differs from the simple majority provision required to pass other bills or joint resolutions. *See* Article 4, §18(1). Article 11 of the Nevada Constitution instructs the Legislature to provide funding for the support and maintenance of the state's public schools.

Nevada's 2004 fiscal year began on July 1, 2003, but the Nevada Legislature did not as of that date, and has not yet, appropriated funds to support and maintain Nevada's budget for the 2003-2005 biennium. As a result, on July 1, 2003, the Governor of the State of Nevada petitioned the Nevada Supreme Court for a Writ of Mandamus declaring the Nevada Legislature to be in violation of the Nevada Constitution and compelling the Legislature to fulfill its constitutional duty to increase revenues to balance Nevada's budget for the biennium beginning July 1, 2003, and to fund public education during that fiscal period.

On July 10, 2003 the Supreme Court of Nevada issued an Opinion and Writ of Mandamus holding that the education requirement of Article 11 override the Article 4, §18(2) provision that makes a two-thirds majority vote necessary to

raise taxes. The Writ directed the Nevada Legislature "to proceed expeditiously with the 20th Special Session under simple majority rule." On July 13, 2003, consistent with the ruling of the Nevada Supreme Court, the Nevada Assembly passed SB 6, a tax increase measure, by vote of 26 in favor and 16 against, which was short of the two-thirds majority provided for by Article 4, §18(2) of the Nevada Constitution.

On July 14, 2003, plaintiffs, consisting of members of the Nevada Legislature and Nevada voters and taxpayers, filed a complaint for injunctive, declaratory and legal relief under the Republican Guarantee Clause of Article IV of the United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and Title 442, United States Code, Sections 1983 and 1988. Named as defendants are several members of the Nevada Legislature, the Governor and Lieutenant Governor of the State of Nevada, and various Nevada government officials charged with implementing legislation enacted by the Nevada Legislature, which could potentially include SB 6.

Plaintiffs seek a declaration from this court that passage of SB 6 without the two-thirds vote required by Article 4, §18(2) of the Nevada Constitution diluted the votes of the Legislator Plaintiffs and diluted the representation to which the Non-Legislator Plaintiffs were entitled, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Republican Guarantee Clause. Plaintiffs also seek to enjoin the defendants from violating Article 4, §18(2) and from giving effect to the action of the Nevada Assembly deeming SB 6 as "passed" without the two-thirds vote required by that provision of the Nevada Constitution.

Also on July 14, 2003, the plaintiffs filed an Emergency Application for Temporary Restraining Order and for an Order to Show Cause Re Preliminary Injunction preventing the defendants from violating Article 4, §18(2) of the Nevada

Constitution and from giving effect to the Assembly's action on July 13, 2003.

Anticipating that other actions would be filed in the District of Nevada[1] raising a similar challenge to the actions of the Nevada Legislature and the Nevada Supreme Court, the active district judges of the court determined it appropriate to consider the plaintiffs' Application for Injunctive Relief en banc. To preserve the status quo pending the *en banc* hearing, this court temporarily restrained the defendants from giving effect to SB 6 as "passed" without the two-thirds vote as required by Article 4, §18(2) of the Nevada Constitution. This temporary injunctive relief did not otherwise limit the actions of the Nevada Legislature. On July 16, 2003, the court conducted an en banc hearing regarding Plaintiffs' Emergency Application for Preliminary Injunctive Relief.

II. Analysis

A. Subject Matter Jurisdiction

The United States Supreme Court has enunciated that "the jurisdiction possessed by the United States District Courts is strictly original" and that district courts have not power to declare that a judgment or ruling of a state supreme court violated provisions of the federal Constitution. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-417 (1923). What became known as the *Rooker-Feldman* doctrine was the result of an amplification of that decision in *District of Columbia Court of Appeals, et al. v. Feldman*, in which the Supreme Court emphatically pronounced that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court. 460 U.S. 462, 482

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[1] Two such actions have already been filed.

(1983). In *Feldman*, the Supreme Court articulated this doctrine as follows:

> If the Constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application [for relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. at 483 n. 16

> United States District Courts...do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.

Id at 486.

"*Rooker-Feldman* is a powerful doctrine that prevents federal courts from second-guessing state court decisions by barring the lower courts from hearing de facto appeals from state court judgments...." *Bianchi v. Rylaarsdam*, No. 00-55585, 2003 WL 21480364, *3 (9th Cir. June 27, 2003)(above quotes form *Feldman* at 583 n. 16 & 485 omitted). In footnote 4 of that opinion, at page *9, the *Bianchi* court noted that,

> It is immaterial that *Bianchi* frames his federal complaint as a constitutional challenge to the state courts' decisions, rather than as a direct appeal of those decisions. The *Rooker-Feldman* doctrine prevents lower federal courts from exercising jurisdiction over any claim that is 'inextricably intertwined' with the decision of the state court, even where the party does not directly challenge the merits of the state court's decision but rather brings an indirect challenge based on constitutional principle.

As established by these authorities, a plaintiff in a United States District Court who was a party to the proceedings in state court confronts an unequivocal jurisdictional bar. *See id.* at *8.

1. Legislator Plaintiffs

Because the Legislator Plaintiffs were named respondents in the Writ, they were parties to the state court action and are precluded form proceeding in this court under the *Rooker-Feldman* doctrine. Indeed, they filed a counter-petition in the state supreme court, which was denied, and have the opportunity to seek reconsideration in that court. Moreover, the Legislator Plaintiffs' claims before this court are direct attacks on the Nevada Supreme Court decision. Because this court cannot grant the relief requested by the Legislator Plaintiffs without voiding the decision of the Nevada Supreme Court, subject matter jurisdiction to consider their claims is lacking. *See District of Columbia Court of Appeals, et al. v. Feldman*, 460 U.S. 462, 483 n. 16 (1983). The only federal court suitable to address those claims is the United States Supreme Court. *See* 28 U.S.C. § 1257.

2. Non-Legislator Plaintiffs

The reach of the *Rooker-Feldman* doctrine to the district court's jurisdiction over the litigants who were not parties to the state court action is less clear. Generally, a plaintiff in the United States District Court who was not a party to the state court proceeding with which his current federal claims are inextricably intertwined is not within the ambit of the *Rooker-Feldman* doctrine unless that party directly attacks the state court judgment. See *Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994). In Johnson, the Court concluded that jurisdiction existed in the lower federal court over the government's claims because it was not a party to

the challenged state court proceedings and, importantly, was not directly attacking the state court judgment. *Id.*

In the instant case, although the Non-Legislator Plaintiffs were not parties to the underlying state court action, they do by their application for injunctive relief directly attack the Nevada Supreme Court's decision. This court can not provide the relief they request without passing judgment on the highest state court's interpretation of its own constitution. In this regard, the situation before us may be distinguishable from the one presented to the Supreme Court in *Johnson*. *See id.* Moreover, in *Rooker* itself, the case presented to the district court included two defendants who had not been parties to the state court litigation. *See* 263 U.S. 413, 414 (1923).

The Legislator Plaintiffs have elected to join the Non-Legislator Plaintiffs in this action and have not sought a severance of their claims. At this stage, it is difficult to determine if they seek relief independent of each other. Under these circumstances, it is not clear that the Ninth Circuit cases holding that the court may have jurisdiction over a plaintiff who was not a party to the underlying state court action are applicable to a case such as this, which directly attacks the decision of the Nevada Supreme Court and has been artfully drafted to include parties who were not parties to the original state court proceedings. See *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998).

Clearly, the claims of the Non-Legislators Plaintiffs, which are identical to those of the Legislator Plaintiff, constitute a direct attack on the decision of the Nevada Supreme Court. Thus, there remains a viable question whether the *Rooker-Feldman* doctrine should be extended to them as well. *See Johnson*, 512 U.S. at 1005-06. Even if this court has jurisdiction over the Non-legislator Plaintiffs, however, their claims cannot survive the requirements of Fed. R. Civ. P. 12(b)(6) because they do not state a claim against the de-

fendants named in the action. Unless the Nevada Supreme Court's decision in *Guinn v. Legislature* is set aside, the defendants herein were in compliance with the law as mandated by the highest court of the State of Nevada, and the claims of the Non-Legislator Plaintiffs cannot succeed against them. Because we have decided this case on the foregoing grounds, we need not address the substantial issues of immunity and ripeness.

The dismissal should, however, be without prejudice to refile in the state courts of Nevada, or alternatively in this court, if in their new action, the Non-Legislator Plaintiffs do not include parties who were also parties to the original Nevada Supreme Court proceeding.

III. Conclusion

IT IS THEREFORE ORDERED that this court's Temporary Restraining Order entered July 14, 2003 is dissolved, and the Legislator Plaintiffs' action is hereby dismissed for lack of subject matter jurisdiction. The claims of the Non-Legislator Plaintiffs are dismissed without prejudice.

APPENDIX D
MINUTE ORDER

United States District Court
District of Nevada

HON. SHARRON E. ANGLE, HON. WALTER ANDONOV, HON. BOB BEERS, HON. DAVID F. BROWN, HON. JOHN C. CARPENTER, HON. CHAD CHRISTENSEN, HON. PETER J. GOICOECHEA, HON. THOMAS J. GRADY, HON. DONALD G. GUSTAVSON, HON, LYNN C. HETTRICH, HON. RONALD L. KNECHT, HON. R. GARN MABEY, JR., HON, JOHN W. MARVEL, HON. RODERICK R. SHERER, HON. VALERIE E. WEBER, Members of the Assembly of the State of Nevada; *et al.*,

Plaintiff(s),

v.

THE LEGISLATURE OF THE STATE OF NEVADA; *et al.*,

Defendant(s).

CV-N-03-371-HDM (VPC)
Minutes of the Court
July 16, 2003

PRESENT:

THE HONORABLE PHILIP M. PRO, CHIEF UNITED STATES DISTRICT JUDGE

THE HONORABLE HOWARD D. McKIBBEN, UNITED STATES DITRICT JUDGE

THE HONORABLE DAVID W. HAGEN, UNITED STATES DISTRICT JUDGE

THE HONORABLE ROGER L. HUNT, UNITED STATES DISTRICT JUDGE

THE HONORABLE KENT J. DAWSON, UNITED STATES DISTRICT JUDGE

THE HONORABLE LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

THE HONORABLE JAMES C. MAHAN, UNITED STATES DISTRICT JUDGE.

Deputy Clerk: Bette Stewart/ Donna Andrews

Reporter: Kathryn M. French

Council for Plaintiff(s): John C. Eastman, Jeffrey A. Dickerson, and Erik S. Jaffe

Council for Defendant(s): William L. Keane, Bradley A. Wilkinson, N. Patrick Flanagan, Brian Sandoval, Jeff Parker, and Richard C. Linstrom

PROCEEDINGS: En Banc Hearing on:

Plaintiffs' Emergency Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (#4/5)/Defendants Heller, Guinn and Chinnock's Motions to Dismiss (#13/15)

9:00 a.m. Court convenes.

Arguments are presented on behalf of the plaintiffs by John Eastman, on belalf of the legislative defendants by William Keane and Bradley Wilkinson, and on behalf of defendants Heller, Guinn and Chinnock by Jeff Parker and Richard Linstrom. Counsel respond to questions of the court.

IT IS ORDERED that the plaintiffs' Application to Show Cause Re Preliminary Injunction (#5) and Defendants Heller, Guinn, and Chinnock Motion to Dismiss (#13/15) stand submitted.

IT IS ORDERED that the Application to File Brief Amicus Curiae of Pacific Legal Foundation and American Legislative Exchange Council in Support of Plaintiffs and Motion for Relief (#11/12) are denied.

IT IS ORDERED that plaintiffs' oral motion to amend the motion for temporary restraining order to bar any action in violation of the two-thirds requirement is granted. The temporary restraining order, as modified, shall remain in effect pending further order of the court.

10:37 a.m. Court adjourns.

Lance S. Wilson, Clerk

By: /s/ (Deputy Clerk)

APPENDIX E

TEMPORARY RESTRAINING ORDER

United States District Court
District of Nevada

HON. SHARRON E. ANGLE, *et al.*,

Plaintiffs,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *et al.*,

Defendants.

CV-N-03-0371-HDM (VPC)

July 14, 2003

ORDER

This action having been referred by the Honorable Howard D. McKibben, United States District Jude, to the undersigned as Chief Judge for consideration of assignment to the active United States District Judge of this Court sitting en banc, and the undersigned having conferred with each of the active judges of the Court, and having determined that the issues raised in Plaintiffs' Emergency Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction should be considered in a comprehensive manner by the active District Judges of this Court sitting en banc, and to preserve the status quo pending such en banc consideration, and good cause appearing.

IT IS ORDERED that Defendants are hereby temporarily restrained from giving effect to the action on July 13, 2003, by the Nevada Assembly deeming SB 6 as "passed" without the two-third vote required by the Article IV, §18(2) of the Nevada Constitution, pending hearing on and further Order of the Court regarding Plaintiffs' Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction.

IT IS FURTHER ORDERED that Plaintiffs' Emergency Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction is hereby scheduled for hearing before the active District Judges of this Court sitting en banc at Las Vegas and Reno, Nevada, to be held on Wednesday, July 16, 2003, at 9:00 a.m. in Courtroom #7C of the Lloyd D. George United States Courthouse, Las Vegas, Nevada, and Courtroom #5 of the Bruce R. Thompson United States Courthouse, Reno, Nevada.

IT IS FURTHER ORDERED that unless otherwise Ordered by the Court, no bond shall be required of Plaintiffs to secure the relief requested.

IT IS FURTHER ORDERED that Plaintiffs shall immediately give notice to Defendants of the hearing scheduled for July 16, 2003, at 9:00 a.m., and the Defendants shall have to and including Tuesday, July 15, 2003, by 12:00 noon within which to file in the United States District Court at Reno, Nevada, any Memorandum of Authorities in response to Plaintiffs' Application for Injunctive Relief.

DATED: July 14, 2003

/s/

PHILIP M. PRO

Chief United States District Judge

APPENDIX F

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
For the Ninth Circuit

Mark E. AMODEI; *et al.*,

Plaintiffs-Appellants,

v.

NEVADA STATE SENATE; *et al.*,

Defendants-Appellees.

No. 03-16326.
D.C. No.
CV-03-00371-HDM/VPC
District of Nevada, Reno
June 22, 2004

Order

Before: T.G. NELSON, W. FLETCHER, and BERZON, Circuit Judges.

By unanimous vote of the panel, Appellants' petition for rehearing is DENIED.